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No. 07-551

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IN THE

Supreme Court of the United States

JOSHUA MICHAELY,

Petitioner,

v.

PATTI MICHAELY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

REPLY BRIEF

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Rule:

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JURISDICTION

Respondent, in her Brief in Opposition to Petitioner's Writ of Certiorari, as more fully set forth below, misses the entire point of the instance proceedings and mis-characterizes the record below ***vis a vis*** Petitioner's claim to due process and equal protection under the Constitution of the State of California and the Constitution of the United States of America.

Further in the above regard, the Respondent, at Page 5, Lines 6 -12 of her Brief in Opposition, states in the most uncertain manner the following:

> It is also doubtful that a "right specially set up or claimed under the Constitution" has been implicated in any of the California proceedings that preceded Petitioner's present Petition for Writ of Certiorari. Consequently, Petitioner has failed to demonstrate a compelling reason for a writ of certiorari to be granted.

Respondent's "doubt" as to Petitioner's right to due process, equal protection, and fair treatment, as implicated at every stage of the California proceedings, sincere as it may be, is contrary to the record below and obvious merits of Petitioner's Writ of Certiorari.

One reason for the dubiousness on the part of the Respondent is made manifest at Page 4, Lines 4 – 5 of her Brief in Opposition, wherein it is stated as follows:

> Petitioner did not raise any due process or other federal questions in his challenge in the trial court.

In that the Respondent labors under this misimpression, as more fully set forth below, it is no wonder the Respondent erroneously concludes, at Page 5, Lines 3 – 6 of her Brief in Opposition, as follows:

> As a result, no "state court of last resort has decided an important federal question" as the term is used in Rule 10 of the Rules of the Supreme Court of the United States.

It is true, the California proceedings below obtained in State not Federal Court, more specifically and more importantly, in State Family Law Court, and, the issues before the court below were not robust federal constitutional questions. Yet, unlike the Respondent, Petitioner has no doubt, and is certain, that time and time again, in the record, Petitioner, both directly and indirectly, raised the question of Petitioner's due process, equal protection, and fair treatment under the Constitutions of California and the United States, and, in this respect, is entirely correct in his characterization of the California Court of Appeal's decision as granting what the Petitioner describes as follows:

> a license to all judges to impose any discovery sanctions they want for any behavior without need and regard to how such sanctions are designed to redress the discovery abuse.

Pet. 2.

For Petitioner to be in error, there must be a limit on the aforementioned judicial conduct someplace in the record below, and, in point of fact, there is no such limitation of record, not even by or under the Constitutions of the State of California or the United States, hence the instance Writ of Certiorari.

With regard to Petitioner's present assertions relevant to a lack of due process, equal protection, and fair treatment in the California proceedings, all as presented in Petitioner's Writ of Certiorari, there is no other special requirement as to the form, the manner, the substance, or the degree to which Petitioner must have raised these fundamental issues in his continuing and unrelenting challenge to the decisions of the court below.

In this particular regard, the assertion by the Respondent, at Page 4, Lines 26 – 28, as follows:

> Two important conclusions can be drawn from the foregoing: (1) Petitioner's due process argument was confined to the collateral estoppel issue – which has not been raised in his Petition for Writ of Certiorari . . .

is not a correct representation of the record.

Petitioner at all times herein of concern has and does challenge the decisions, in total, of the courts below, including that of the trial court, as contrary to the law and to the Constitutions of the State of California and the United States, all in violation of Petitioner's right to due process, equal protection, and fair treatment, hence,

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there is no doubt that this matter, coming out of lowly State Family Law court proceedings indeed presents serious questions of rights specifically set up and claimed by and under the Constitution(s).

Respondent, in this latter regard, in its Brief in Opposition, trivializes the proceedings below as a Family Law matter, saying Petitioner cites not such cases in support of his position. And, there are no Family Law cases ***per se*** in this genre of the law. But, that circumstance does not trivialize this proceeding, and, instead, it magnifies the importance of this pending matter in that the majority of Americans who experience litigation is involved in Family Law court, these courts do not follow the usual rules of civil procedure, and they have no jury proceedings. As a result, it is of paramount importance to all Americans that these same courts conduct the legal process under the Constitution(s) and consistent with statutory law, and, in so doing, do not violate any party's right to due process, equal protection, and fair and impartial treatment under the law.

ARGUMENT

The most egregious error made by the doubting Respondent is presented on Page 11, Lines 3 – 13, wherein it is stated as follows:

> This is a gross misreading of the Court of Appeal Opinion. The Opinion simply affirms the sanctions imposed by the trial court for Petitioner's egregious evasion of his duty to respond forthrightly to Respondent's discovery after being ordered to sit for his deposition.

> The trial court did not "impose any discovery sanctions (it) want(ed to)" – it only imposed the sanctions authorized by California Code of Civil Procedure sections 2023.30 and 2025.450 for the offending conduct described in these statutes.

This assertion is erroneous on multiple levels, including (1) the trial court did not impose sanctions authorized by law, and, instead, made orders in the guise of sanctions contrary to law and (2) nothing in either of the cited code sections, or any of the relevant California law, in any way authorize what the trial court did in this matter, which was to deprive the Petitioner of all of his interest in all of the property of concern, be it community or separate in nature, and (3) in so doing the aforesaid, the trial court did indeed violate Petitioner's right to due process, equal protection, and fair treatment under the law.

The Respondent, at Page 3, on Line 5, makes reference to the "Report and Order," alluding to the Report and Order premised upon the Report, Findings, and Recommendation of Referee Retired Judge Martha Goldin, of record herein.

The Report and Order is not in dispute, and it identifies various properties of the parties below, and, further, classifies one and all of them as community property of the Petitioner and Respondent. And, the trial court, thereupon, awarded all of the aforesaid community property to the Respondent. In making its decision, the trial court relied upon the aforesaid code sections.

Yet, neither section 2023.30 or 2025.450 give authority to the court to essentially forfeit Petitioner's community property. True, the trial court could error and find separate property to be community, and such would be subject to appeal, however nothing in any of the laws of the State of California authorize the trial court to confiscate Petitioner's interest in property the court has found to be community in nature.

Likewise, whatever the trial court did was required to be consistent not only with the law but also with the pleadings of the parties, all of record herein. And, in this regard, the Respondent's pleadings below prayed for only what she was entitled to under the applicable Family Law, to wit: no more than one (1/2) half of the identified community property assets of the parties. Respondent at no point in the proceedings ever requested more, other, or further than what was and is authorized and provided for by law.

Hence, the trial court's decision to deprive the Petitioner of everything, and to award to the Respondent all of the identified community property assets of the parties, was and is contrary to the applicable laws of the State of California, was and is beyond the authority of the trial court, and was and is inconsistent with the Constitution of the State of California and the United States.

The end result of all of this, very clearly, was and is the violation of the Petitioner's right to life, liberty, and property under the Constitutions of the State of California and the United States, and, in this regard, his right to due process, equal protection, and fair treatment have been violated.

REASONS TO GRANT THE PETITION

Where there has been a violation of Petitioner's right to due process, equal protection, and fair treatment under the law and the Constitution, the petition of concern should be granted. The law abhors forfeitures, and, in point of fact, pursuant to the above, the confiscation of private property sustained by the Petitioner under the trial court's erroneous decision was and is contrary the law and the Constitution.

Respondent in its Brief in Opposition, at Page 8, Lines 16 – 20, represents that Rule 37 of the Federal Rules of Civil Procedure mirror the sort of sanctions authorized by section 2023.30 or 2025.450. This is for the most part true, but the assertion is irrelevant to the instance case.

Specifically, there is no divorce or Family Law litigation at the Federal level, hence Rule 37 has never found application in any such Family Law case. And, even if it were so applied, Rule 37 in no way would otherwise authorize or permit the sort of trial court decision that is the subject of this proceeding.

Respondent, in the above regard, goes on to state that Rule 37 empowers the trial court to prohibit a disobedient litigant from even introducing evidence as to certain designated claims. This too is true, but, again, it is of no import in the pending matter.

In this case, as now before the court, even if the trial court prohibited the disobedient litigant from introducing evidence as to certain designated claims,

then, the Respondent would thereby be entitled to prevail on those claims, per the pleadings, and, in this case, the pleadings were and are unambiguous, to wit: the Respondent asserted a community, being fifty (50%) percent interest, in the claimed property, and, even in a situation of default, voluntary or imposed, the Respondent was and is entitled to said fifty (50%) percent interest, not more, not under the pleadings, not under any definition of the "Res" in controversy, not under any applicable law or statute, and, certainly, not under section 2023.30 or 2025.450, and not under either the Constitution of the State of California or the United States.

And, at Page 10 of Respondent's Brief in Opposition, at Lines 12 – 14, it is stated as follows:

> From these existing federal cases, it is clear that the California Court of Appeals decision is not in conflict with the decisions of the federal judiciary.

Yet, this statement is vacuous, specifically because *Insurance Corp of Ireland, Ltd. v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 102 S. Ct. 2099, 72 L. Ed. 2d 492, *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, and *Roadway Express, Inc. v. U.S. Department of Labor, Administrative Review Board*, 495 F.3d 477 (2007) are substantially distinct from the instance proceedings and are distinguishable.

In all of the cases cited, there was the whole of property in dispute by and between the parties whereby each party claimed from the outset all of the "Res" in controversy, hence, most assuredly, the courts below in those matters had both legal and procedure authority to award the property, upon proper findings and or pursuant to any applicable law, and or in the case of a default (voluntary or otherwise) the entire property to either one or the other of the parties. These were and are civil cases.

The instance proceedings, as Respondent has pointed out, are Family Law proceedings, and these same Family Law proceedings are governed by civil Family Law statutes and rules, including rules of pleading and practice.

As already mentioned in the above, by and under the Constitution, the applicable Family Law statutes and rules, as well as the relevant rules of pleading and practice, and the pleadings of record herein, the identified community property, the "Res" ***per se*** in this matter has never been "up for grabs" by either or both parties, and, in point of fact, at most, as to either or both parties, only fifty (50%) percent thereof has ever been "in play" or otherwise subject to order and award by the trial court.

There is nothing in any of the cited cases, the law of the State of California, the rules of pleading and practice of that State, the Federal law, the Federal rules of pleading and practice, the Constitution of California, or the Constitution of the United States to permit the trial court to take property of and from the Petitioner and

award it to the Respondent, and, in so doing, give to her more than the law allows, even more than she has prayed for in the pleadings. And, to so do, under the guise of discovery sanctions has no support in fact or law, and goes above and beyond the statutory and Constitutional authority of the court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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